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MAR 1 1941
CHARLES ELMORE CROPLEY
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 800

NORMAN B. FROST AND FREDERIC N. TOWERS, two of the Executors of and Trustees under the Will of Mary H. Lincoln, deceased; UNITED STATES TRUST COMPANY OF NEW YORK, Ancillary Executor of the Will of Mary Lincoln Isham, deceased; JESSIE LINCOLN RANDOLPH, LINCOLN ISHAM, MARY LINCOLN BECKWITH AND ROBERT LINCOLN BECKWITH, *Petitioners,*

v.

AMERICAN SECURITY AND TRUST COMPANY, as Remaining Executor of and Trustee under the Will of Mary H. Lincoln, deceased; THE AMERICAN NATIONAL RED CROSS, a Body Corporate; FIRST CHURCH OF CHRIST SCIENTIST, a Body Corporate; AND IOWA WESLEYAN COLLEGE, a Body Corporate, *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

NORMAN B. FROST,
FREDERIC N. TOWERS,
In Proper Person.
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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners seek to have reviewed the decision of the United States Court of Appeals for the District of Columbia, decided November 25, 1940. The opinion of the Court appears at page 21 of the Appendix hereto.

Short Statement of Facts.

Mary Harlan Lincoln, widow of the late Robert Todd Lincoln, died testate March 31, 1937. Petitioners Jessie Lincoln Randolph, Lincoln Isham, Mary Lincoln Beckwith and Robert Lincoln Beckwith are, respectively, decedent's daughter and grandchildren. The United States Trust Company is the legal representative of Mary Lincoln Isham, a deceased daughter. Petitioners Norman B. Frost and Frederic N. Towers (hereinafter referred to as the "individual Executors") are two of the Executors of and Trustees under the Lincoln Will. Respondent American Security and Trust Company (hereinafter referred to as the "corporate Executor") is the remaining Executor of and Trustee under the Will. The other respondents, American Red Cross, Christian Science Church, and Iowa Wesleyan College, are contingent remaindermen.[1]

The Will set up a trust and provided income payments for decedent's children and grandchildren (hereinafter referred to as the "life-beneficiaries") with remainder to their "issue by direct descent"; or, failing such issue, to the corporate remaindermen after the death of the survivor of the life-beneficiaries. The Will appears at page 13 of the Appendix hereto.

When the Will was executed, there were no issue competent to take decedent's estate after the life interests. It then seemed unlikely that any such would be born. None in fact presently exist.[2]

The present litigation involves the construction of a testamentary power, vested in the Executors and Trustees—

> "to decide finally any question that may arise as to what constitutes income and what principal,—it being my wish, however, that whenever feasible their decision be in favor of the life-beneficiaries named herein * * *". (Appendix hereto, pp. 18, 19.)

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[1] The contingent remaindermen did not appeal from the District Court decision; the sole appellant below was the corporate Executor.

[2] As to the ages and marital status of the life-beneficiaries, see Record, pp. 68, 69, 118, 119.

Decedent's gross personal estate aggregated approximately $3,300,000. During the year of administration certain assets of the estate were sold to pay taxes and other estate obligations. Prior to sale, these assets had produced income—dividends and interest—amounting to $38,018.84. Income of this nature is sometimes called "non-residuary income", and will be referred to as such in this paper.

At the time testatrix executed her will (December, 1935) it was the practice in the District of Columbia to distribute non-residuary income to life-beneficiaries (R. 49). Testatrix died March 31, 1937. More than a year later the United States Court of Appeals for the District of Columbia adopted the "Massachusetts rule" respecting the disposition to be made of non-residuary income. Under this rule such income is required to be added to corpus. *Proctor v. American Security and Trust Company*, 98 F. (2d) 599; 69 App. D. C. 70. The individual Executors nevertheless believed that under the Lincoln Will non-residuary income could and should be distributed to the life-beneficiaries.

During the year of administration a stock dividend (declared out of earnings of the issuer) was received by the estate. Under a decision of this Honorable Court, deemed by the corporate Executor to be controlling, this dividend was allocated to corpus. The individual Executors, however, believed its distribution to the life-beneficiaries essential to carry out testatrix' intention.

The individual Executors hence notified the corporate Executor of their decision to distribute the referred to income and stock dividend to decedent's children and grandchildren, giving as their reason, among others, testatrix' expressed preference for her life-beneficiaries.

The corporate Executor refused to concur fully with the individual Executors, and the Bill to Construe Will was thereupon filed in the District Court. The corporate Executor's Answer set up that it believed distribution of the non-residuary income would "be in accord with the intentions expressed by Testatrix in her Will", but that the stock dividend constituted corpus.[3]

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[3] R. 30, 31, 32, 114, 115, 116.

A Special Master was appointed by the Court and found—

> (a) The testatrix intended distribution of non-residuary income to her life-beneficiaries, and the power might be exercised to accomplish that purpose;
>
> (b) The decisions of the Supreme Court of the United States respecting disposition of stock dividends (e. g. *Gibbons* v. *Mahon*, 136 U. S. 549; 34 L. Ed. 525) proscribed similar distribution of the stock dividend.

The corporate Executor and individual Executors both filed exceptions to the Master's Report; and, after hearing, a District Judge affirmed on point "(a)" and reversed on point "(b)" above, finding as a *fact* that—

> "The plain intention of the testatrix as to distribution of accretions to her estate was to conduce the distribution of all thereof, whenever possible, to her named life-beneficiaries,—her children and grandchildren."

Distribution to life-beneficiaries of the income and stock dividend was ordered accordingly.

The corporate Executor appealed to the United States Court of Appeals for the District of Columbia and the complained of decision followed. The opinion was by a divided Court, the majority holding that both items should be allocated to corpus.[4]

Within the time prescribed by rule, petitioners filed a Motion for Rehearing. The Court of Appeals denied this Motion December 16, 1940.

Points Relied Upon for Allowance of Writ.

The decision referred to should be reversed because—

1. It is based upon an erroneous principle of law;

2. It ignores the policy of the law which favors distribution rather than accumulation of trust income;

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[4] Of the six appellate judges, only three sat; one of these, Justice Rutledge, dissented.

3. The Court below failed to consider and determine a decisive point raised by petitioners in the appeal; and

4. The lower Court has not given proper effect to an applicable decision of this Honorable Court.

Wherefore, your petitioners respectfully pray that a writ of *certiorari* may be issued out of and under the seal of this Court, directed to the United States Court of Appeals for the District of Columbia, commanding the said Court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Court of Appeals in the said case therein, entitled *American Security and Trust Company, as Remaining Executor of and Trustee Under the Last Will and Testament of Mary H. Lincoln, Deceased, Appellant,* v. *Norman B. Frost and Frederic N. Towers, Two of the Executors of and Trustees Under the Last Will and Testament of Mary H. Lincoln, Deceased, et al., Appellees,* No. 7481, to the end that the said case may be reviewed and determined by this Court as provided in Judicial Code, §240, or that your petitioners may have such other or further relief or remedy in the premises as to this Court may seem appropriate and in conformity with the said act, and that the said judgment of the said Court of Appeals in the said case, and every part thereof, may be reversed by this Honorable Court.

And your petitioners will ever pray.

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